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MOTION FILED

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No. 00-836

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2000

GEORGE W. BUSH,

Petitioner,

v.

PALM BEACH COUNTY CANVASSING BOARD, ET AL.,

Respondents.

On Petition for a Writ of Certiorari To The Supreme Court of Florida

---

MOTION FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF UNDER RULE 37.1 AND 37.2(A) WITH ATTACHED BRIEF *AMICUS CURIAE* OF JAMES J. CLANCY (MEMBER OF THE U.S. SUPREME COURT BAR) IN SUPPORT OF PLAINTIFF GEORGE W. BUSH.

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November 23, 2000

5200

QUESTION PRESENTED

Whether, under the **Doctrine of Separation of Powers,** the Florida Supreme Court, in a Federal Election to Determine the Presidency of the U.S., Lacks Subject Matter Jurisdiction to Interfere with the Acts and Duties of Secretary of State Katherine Harris with Respect to the Time Constraints Imposed by Federal Statute Where the Statute as Enacted by the Florida Legislature Has Delegated to the Secretary of State the Power to also Act as a Quasi-Judicial Officer in Election Matters Both Federal and State; and Where the Legal Constraints Which Are Imposed by Such Federal Statute in Federal Elections (Which Have Required Her to Act in the Federal Election) Are Not Present with Respect to State Elections, Because of the Absolute Right of the Florida Supreme Court under the **11TH Amendment** to Act as a Sovereign and to Stop the Clock as May Be Necessary in State Election Matters?"

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MOTION FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF UNDER RULE 37.1 AND 37.2(A) WITH ATTACHED BRIEF *AMICUS CURIAE* OF JAMES J. CLANCY (MEMBER OF THE U.S. SUPREME COURT BAR) IN SUPPORT OF PLAINTIFF GEORGE W. BUSH.

INTEREST OF AMICUS CURIAE

Amicus Curiae is a resident of La Tuna Canyon, California and a member of the U.S. Supreme Court Bar. Over the past 37 years, ***Amicus*** has filed approximately 100 Briefs in the U.S. Supreme Court in two (2) areas of the law involving public morals: **(1)** the crime of obscenity vs. free speech, and **(2)** the common law misdemeanor crime of abortion and infanticide (partial birth abortion) vs. the privacy right expressed in ***Roe v. Wade***, 410 U.S. 113, 35 L.Ed.2d 147, 93 S.Ct. 705 (1973).

Amicus contends that, at the present time, both of these areas of the law are poorly regulated by Rules of Law which defy the Natural Law. ***Amicus*** contends that the issue of free speech and the right to abate obscenity as a public nuisance should be regulated by the **11TH Amendment** "state right" expressed by Associate Justice Harlan in his concurring and dissenting opinion in ***Roth v. U.S.*** (***Roth-Alberts***) 354 U.S. 476, 1 L.Ed.2d 1498, 77 S.Ct. 1304 (1957).

Amicus further contends that the so-called abortion right "created" in ***Roe v. Wade***, supra, is contrary to the Natural Law, that abortion is a "crime", not a "public" right; rather, it is a "private cross" which must be borne by the "family" unit; and that the Common Law misdemeanor crime of "abortion" and the "infanticide crime" (a.k.a. partial birth abortion) are distinguishable and should be regulated as **11TH Amendment** matters relating to "public morals" which are regulated by "State Sovereignty" and by the "State Judiciary" as in the case of the "obscenity" crime.

Amicus' contention that the so-called **11TH Amendment** "State Right" approach should control both of the above areas of the law has caused him to vote for George W. Bush because ***Amicus*** believes that George W. Bush's philosophical view of the law re "obscenity" and "abortion" is closer to the philosophical view of this ***Amicus Curiae*** than is the philosophical view of Albert Gore.

On February 2, 2000, ***Amicus Curiae*** filed a Motion for Leave to File an ***Amicus Curiae*** Brief in ***Pryor v. Summit Medical Associates***, No. 99-1042, which informed the members of this Court that because the Alabama Infanticide Statute had not been given a "definitive construction" by the Alabama Supreme Court, the High Court's decision in that case, under the **11TH Amendment**, was and is an advisory opinion only and did not bind the State. See the nature of the Motions as described on the cover of the ***Amicus Curiae*** and Private Attorney General Briefs in that case at **Appendix A** to this ***Amicus Curiae*** Brief.

On February 28, 2000, ***Amicus Curiae*** filed a Motion for Leave to File an *Amicus Curiae* Brief in ***Stenberg v. Carhart***, No. 99-830, which informed the members of this Court that, because the Nebraska Infanticide Statute had been prevented from being given a "definitive construction" by the Nebraska Supreme Court, the High Court's decision in that case, under the **11TH Amendment**, was and is an advisory opinion and did not bind the State. See the nature of the Motions as described on the cover of the ***Amicus Curiae*** and Private Attorney General Briefs in that case at **Appendix C** to this ***Amicus Curiae*** Brief.

On March 31, 2000, the undersigned filed a Motion for Leave to Intervene Pursuant to **F.R.C.P. 24** and filed that Document in this Court as a Private Attorney General to inform this Court regarding the refusal and failure of Attorney General Bill Pryor to perfect the **11TH Amendment** plea in that case. See the nature of the Motion as described on the cover in that

case at **Appendix B** to this ***Amicus Curiae*** Brief.

RE "DUE PROCESS" AND "EQUAL PROTECTION OF THE LAW"

Amicus supports Petitioner George W. Bush's claim of a right to relief on "due process" and "equal protection of the Law" grounds under the Florida Supreme Court's opinion and further asserts that its opinion abridges the voting rights of the ***Amicus Curiae*** to cast his vote to have George W. Bush succeed to the Presidency. However, ***Amicus*** contends that such rights need not and should not be litigated in this case because those issues need not be reached upon the facts and record in this case. The Petition for a Writ of Certiorari herein should be limited to and resolved by this Court on the Florida Supreme Court's blatant violation of the **Doctrine of Separation of Powers** and the right of Petitioner George W. Bush to a peremptory writ of prohibition/mandate in support of this Court's Appellate Jurisdiction under **Rule 20.1 of the U.S. Supreme Court**.

The Florida Supreme Court's refusal to acknowledge and its avoidance of Petitioner Bush's general claim of a violation of the **Separation of Powers Doctrine** is convincing evidence that the Florida Supreme Court's opinion does, in fact, present a political decision. ***Amicus*** regretfully submits that the seven Justices, by avoiding that issue, demonstrate that they, as Democrats, were misled by their philosophical "desire" that Gore, the Democrat, and not Bush, the Republican, should gain the Presidency.

RE THE 11TH AMENDMENT AND THE JURISDICTIONAL QUESTION PRESENTED, SUPRA.

This Court should note certiorari on the narrower **11TH Amendment** issue which is framed herein regarding the State Statute which was enacted by the Florida State

Legislature. Under ***Watson v. Buck***, 313 U.S. 387, 85 L.Ed. 1416, 61 S.Ct. 962, 136 A.L.R. 1426 (1941), that part of the State Statute, which refers to the Florida State Legislature's delegation to Secretary of State Katherine Harris the right and duty to act in this federal election contest, has never been given its first interpretation and construction. Under the **11TH Amendment** and the **Separation of Powers Doctrine**, the State Legislature has the sovereign right to have the Statute as enacted construed initially by the State Judiciary which in turn, is under a duty to give it a constitutional interpretation– in this case, not only under the **Florida Constitution**, but also under the **U.S. Constitution**. When the State Legislature delegated this specific responsibility to Secretary Harris, it was assigning to her the duty to act in a quasi-judicial capacity together with the duty to act with discretion in executive matters. Her interpretation to this effect, if reasonable, cannot be upset by the subsequent action of the Florida Supreme Court for the reasons hereinafter explained.

The Jurisdictional Question which ***Amicus Curiae*** has set forth below frames a "rhetorical question" which the Florida Supreme Court must first address– and which this Court must face and decide before it reaches the "due process" and "equal protection of the laws" problems which have been created by the Florida Supreme Court's ***sua sponte*** decision that such a construction is erroneous. It would be wrong for this Court not to resolve this claim which ***Amicus Curiae*** submits is the real and only issue before this Court [V]. The question as framed, and answered by that "framing", reads as follows:

" QUESTION PRESENTED

" Whether, under the **Doctrine of Separation of Powers**, the Florida Supreme Court in a Federal

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[V] Recently the legal profession has come under attack as a profession of "spin artists". More than anything else, we as a people have got to reclaim our pride in the virtue of honesty displayed by George Washington.

Election to Determine the Presidency of the U.S. Lacks Subject Matter Jurisdiction to Interfere with the Acts and Duties of Secretary of State Katherine Harris with Respect to the Time Constraints Imposed by Federal Statute Where the Statute as Enacted by the Florida Legislature Has Also Thereby Delegated to the Secretary of State the Power to Also Act as a Quasi-Judicial Officer in Election Matters Both Federal and State; and Where the Legal Constraints Which Are Imposed by Such Federal Statute in Federal Elections (Which Have Required Her to Act in the Federal Election) Are Not Present with Respect to State Elections Because of the Absolute Right of the Florida Supreme Court under the **11TH Amendment** to Act as a Sovereign and to Stop the Clock as May Be Necessary in State Election Matters?"

STATEMENT OF THE CASE

Amicus accepts the Statement of Facts of Record as s omitted by Petitioner in his Petition for Writ of Certiorari herein, but claims in that regard that the majority of facts, as pleaded, are irrelevant in the light of the "agreed upon facts" of record which are sufficient for a majority of this Court, ***sua sponte***, to grant a peremptory writ of mandamus and/or prohibition, forthwith, pursuant to **Rule 20.1** of the U.S. Supreme Court. Accordingly, ***Amicus Curiae*** requests this Court to consider this pleading of ***Amicus Curiae*** as being in the nature of a Private Attorney General request pursuant to ***Alyeska Pipeline Serv. v. Wilderness Soc.***, 421 U.S. 240, 44 L.Ed.2d 141, 95 S.Ct. 1612 (1975) and moves this Court on behalf of Petitioner for leave of Court to Petition for the additional relief; that is, the issuance of an extraordinary prerogative writ forthwith under **Rule 20.1** of the **U.S. Supreme Court Rules**.

The above"agreed upon facts" as framed in the

rhetorical "Jurisdictional Question" are of record and are probative because they are not disputed. Further, the record is rife with the repetitious legal contention (conclusion) of Petitioner George W. Bush that the Florida Supreme Court's ruling is, ***per se***, a violation of the **Separation of Powers Doctrine**. This Court in its ruling on the Petition can issue its writ of certiorari and a peremptory writ of mandamus and/or prohibition forthwith and without further oral argument or delay in the federal election process.

Had the facts in this case been present in the background of a state election, the decision by the Secretary of State Katherine Harris would have been vulnerable in its review by the Florida Supreme Court because that Court is the ultimate arbiter of legal questions on state matters. In such a case, the Florida Supreme Court has the absolute power to "stop the clock" and render its opinion on what should be done, so long as it is consistent with **Federal Due Process** and **Equal Protection of the Laws** standards. This Court would not have subject matter jurisdiction of such a case unless federal standards were violated.

THE PROBATIVE FACTS

This case, however, involves an all important federal election. The federal time line and time constraints are important and are controlling. The Florida Statute clearly gave the Secretary of State the right to make her initial "call" as a quasi-judicial ruling. This is consistent with the **11TH Amendment** right of the states to enact such legislation on important state matters. The **Separation of Powers Doctrine** in conjunction with the **11TH Amendment** gives the state legislatures the right to enact a law and the additional right under ***Watson v. Buck***, supra, to have the state judiciary give that law its initial construction. If the state court in that "role" concludes that "black" is "white" to save the statute, then the federal court is required to deal with that statute on those terms. However, no such further construction is necessary in this case

because Secretary of State Harris' ruling as a quasi-judicial construction was consistent with the federal requirements. In as much as the aforesaid probative facts of record are admitted, this Court should issue an extraordinary writ of mandate or prohibition forthwith.

A decision on the single narrow grounds herein required is urgently needed. This case presents an opportunity for a majority of this Court to come together quickly on the admitted "Statement of Facts". Because the Florida Supreme Court decision is "notorious" for its partiality, the decision of this Court to review on the above narrow grounds, ***sua sponte***, will be written upon the minds of all law students for an eternity of time and will inform the world at large of that fact– a world which is beginning to look upon the U.S. as the "master of lies" because of the weakness of its leaders and their tendency to choose the "spin doctrine" as a means of lying their way out of an unfortunate situation such as being caught next to the cherry tree with an ax in their hands. The present disaster can be turned into a "blessing" if this Court will act "post haste" by immediately issuing a prerogative writ ordering the Florida Supreme Court to vacate that part of its ruling which reversed the trial court ruling which affirmed Katherine Harris' ruling in this federal case as being proper.

The quicker this Court rules on this matter, the better. The vote tabulation can be tabulated pursuant to the Secretary of State's determination, the President Elect can be identified and that person (Bush or Gore) can go about with his preparation for ascendancy to the Office of the Presidency.

RE: THE CRITICAL ISSUE FRAMED BY THE DIVERSITY IN THE OPINIONS ISSUED BY THE DIVISIONS OF ELECTIONS AND THE ATTORNEY GENERAL

At page 8, the following agreed "Statement of Facts" appears:

"II. Proceedings In The Florida Supreme Court

" The Supreme Court of Florida consolidated the two cases discussed above: (a) the original action brought by the Palm Beach County Canvassing Board asking the court to resolve the conflicting advisory opinions issued by the Division of Elections and the Attorney General; and (b) the appeal from the Leon County Circuit Court's decision that the Secretary of State had not abused her discretion in deciding not to include results from manual recounts filed after the 5:00p.m. November 14 deadline in the statewide tabulation.

" **A. The State Court's Decision**

" On Friday, November 17, 2000, the Florida Supreme Court *sua sponte* enjoined the Secretary of State from certifying the November 7 presidential election results for the State of Florida until further order from the Court. App., *infra*, 40a-41a. On Monday, November 20, after weekend briefing by the parties, the court heard oral argument.

" Late on the evening of November 21, 2000, the Florida Supreme Court issued its opinion reversing the orders of the state trial court. App., *infra*, 1a-39a. The supreme court held that the trial court 'erred in holding that the Secretary of State acted within her discretion in prematurely rejecting any amended returns that would be the result of ongoing manual recounts.' App., *infra*, 35a. The supreme court reached this conclusion by announcing a new rule of law to constrain the Secretary's discretion under Fla. Stat. §§ 102.111 and 102.112, declaring for the first time that 'the Secretary may reject a Board's amended returns only if the returns are submitted so late that their inclusion will preclude a candidate from contesting the certification or

preclude Florida's voters from participating fully in the federal electoral process.' *Id.* At 37a."

Amicus disagrees with the position taken by the attorneys for the Petitioner George W. Bush regarding the nature of the "conflicting advisory opinions". ***Amicus*** contends that Petitioner George W. Bush is correct in his assessment on Television that the Florida Supreme Court had "overreached" in its ***sua sponte*** determination that Secretary of State Harris was merely exercising a discretionary act as a member of the Executive Branch. She had, in fact, also exercised the discretion given her by the Florida Legislature; that is, as a "quasi-judicial fact finder" in resolving the "fact" issue created by the fact that the proceeding which was before her involved a federal election and federal time constraints imposed by the federal statutes and not a state election in which such time constrictions did not present a problem.

Because the question which was before her had never been raised, under the **11TH Amendment** and the **Doctrine of Separation of Powers**, the initial statutory construction she rendered as to the time constraint was valid and was binding not only upon the Gore camp, but also upon the Florida Supreme Court which was required to uphold her construction as valid and binding pursuant to the **Separation of Powers Doctrine** requirement that the Florida Supreme Court do everything within its power to support the Legislature and its legislation and prevent a possible conflict with the time constraints of the federal government (which did in fact occur as a result of the Florida Supreme Court's ***sua sponte*** determination).

In this instance, the Florida Supreme Court "overreached". The result would have been otherwise, had the election been a state election. In that case, the Florida Supreme Court would have been the ultimate authority because it would have been concerned with a "state matter" in which the Court was the supreme authority and could have "stopped the clock".

The power which was endowed upon the Secretary of

State Harris by the State Legislature was the equivalent of the fact finding role of a city council in determining from the facts of record whether a zoning determination should or should not be made. In making such a determination, the city council (which as a legislative body normally does not sit in a quasi-judicial capacity) also enjoys its concomitant role as a quasi-judicial fact finder. See, in this regard, the argument made by ***Amicus*** to this Court in his attempt to have this Court note jurisdiction in the claim of ***Clarence F. Murphy v. Planned Parenthood of Greater Iowa, Inc., et al.***, Scott County District Court Case No. 94716, at paragraph 25 on pages C-14 and C-15 (see **Appendix C** herein) which also appears in his ***Amicus Curiae*** Brief in ***Stenberg v. Carhart***, No. 99-930, at Appendix pages C-14 and C-15, which is reproduced herein as **Appendix C-1** through **C-22**.

CONCLUSION

Wherefore, ***Amicus*** requests this Court to construe this Petition for Writ of Certiorari herein as a Petition by George W. Bush for an Extraordinary Writ under **Supreme Court Rule 20.1** and forthwith issue a peremptory writ requiring the Florida Supreme Court to vacate that portion of its November 21, 2000 opinion which reversed the orders of the state trial court as noted on page 8, supra.

Dated: **November 23, 2000** (Thanksgiving Day)

Respectfully submitted

_____

James J. Clancy, ***Amicus Curiae***
and Counsel of Record.

CERTIFICATE OF COUNSEL

Consent to the filing of this ***Amicus Curiae*** Brief is requested of Counsel of Record for Petitioners and Respondents by the Service of this **Motion** and ***Amicus Curiae*** **Brief** (Express Mail to Counsels of Record). A copy could not be faxed to each addressee on Thursday or Friday, November 23-24, 2000 because such Offices were not open for such services.

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Dated: **November 23, 2000**
(Thanksgiving Day)

_____

James J. Clancy, ***Amicus Curiae***
and Counsel of Record.

APPENDIX A

COVER SHEETS OF 5 PLEADINGS OF THE ***AMICUS CURIAE*** IN ***BILL PRYOR, ATTORNEY GENERAL OF ALABAMA, ET AL. V. SUMMIT MEDICAL ASSOCIATES, P.C., ET AL.***, NO. 99-1041, FILED WITH THE CLERK OF THE U.S. SUPREME COURT ON FEBRUARY 2, 2000; MARCH 31, 2000; APRIL 17, 2000; JUNE 20, 2000; AND JULY 20, 2000, WHICH DESCRIBE THE NATURE OF THE PLEADINGS IN THAT CASE.

(Reference: Brief ***Amicus Curiae*** of James J. Clancy at **page 2, paragraph 2.)**

A-1

No. 99-1041

EXHIBIT 1

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1999

BILL PRYOR, in his official capacity as Attorney General for the State of Alabama and his agents and successors; and **ELLEN BROOKS**, in her official capacity as Montgomery District Attorney;

Petitioners,

v.

SUMMIT MEDICAL ASSOCIATES, P.C.; BEACON WOMEN'S CENTER; NEW WOMAN, ALL WOMEN HEALTH CARE; and WILLIAM H. KNORR, M.D., on behalf of themselves and their patients' seeking abortions;

Respondents.

On Petition for Writ of Certiorari to the
United State Court of Appeals for the Eleventh Circuit

MOTION FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF UNDER RULE 37(2)(b) WITH ATTACHED BRIEF AMICUS CURIAE OF JAMES J. CLANCY (MEMBER OF THE SUPREME COURT BAR) IN SUPPORT OF NEITHER PARTY, SUGGESTING REVERSAL OF THE JUDGMENT FOR RESPONDENTS FOR LACK OF SUBJECT MATTER JURISDICTION; PURSUANT TO THE AUTHORITY OF THE 11TH AMENDMENT, *WATSON V. BUCK*, 313 U.S. 387 (1941); *YOUNGER V. HARRIS*, 401 U.S. 37 (1971); *HUFFMAN V. PURSUE, LTD.*, 420 U.S. 592 (1975); AND THE *YOUNGER - HUFFMAN* ABSTENTION DOCTRINE.

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February 2, 2000

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EXHIBIT 3

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1999

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Petitioners,

v.

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No. 99-M-_____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1999

IN RE JAMES J. CLANCY,

Petitioner.

MOTION FOR AN ORDER, DIRECTING CHIEF DEPUTY CLERK FRANCIS J. LORSON OF THE U.S. SUPREME COURT TO TRANSMIT SUBMITTED PLEADINGS TO THE COURT (FILED BY U.S. EXPRESS MAIL ON MARCH 31, 2000) IN *BILL PRYOR, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL FOR THE STATE OF ALABAMA, AND HIS AGENTS AND SUCCESSORS; AND ELLEN BROOKS, IN HER OFFICIAL CAPACITY AS MONTGOMERY DISTRICT ATTORNEY*, NO. 99-1041, BEING 40 COPIES OF THE "MOTION OF JAMES J. CLANCY, A MEMBER OF THE U.S. SUPREME COURT BAR: (1) FOR LEAVE OF COURT TO INTERVENE PURSUANT TO F.R.C.P. 24, AND FILE THIS DOCUMENT AS A PETITION FOR REHEARING; AND (2) FOR A WRIT OF MANDAMUS PURSUANT TO 28 U.S.C. §1651(a) AS A PRIVATE ATTORNEY GENERAL FOR A CLARIFICATION OF THIS COURT'S RULE OF COURT EXPRESSED IN *PUERTO RICO AUTHORITY V. MEDCALF AND EDDY* RE THE 11TH AMENDMENT PLEA OF ATTORNEY GENERAL BILL PRYOR; TO BE HEARD PURSUANT TO A PETITION FOR REHEARING AND THIS COURT'S *SUA SPONTE* DUTY UNDER *STEEL CO. V. CITIZENS FOR A BETTER ENVIRONMENT*, 523 U.S. 836 (MAY 4, 1998) TO CONSIDER 'LACK OF SUBJECT MATTER JURISDICTION' AS ITS FIRST ORDER OF BUSINESS."

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JUNE 20, 2000

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1999

IN RE JAMES J. CLANCY,

Petitioner.

MOTION OF JAMES J. CLANCY FOR LEAVE OF COURT TO FILE A DECLARATION UNDER PENALTY OF PERJURY IN SUPPORT OF TWO MOTIONS AS AN INTERVENOR-PRIVATE ATTORNEY GENERAL FILED BY U.S. EXPRESS MAIL ON JUNE 20 AND JUNE 25, 2000 IN *IN RE CLANCY*, NO. 99-M-___, WHICH REQUESTED AN ORDER DIRECTING DEPUTY CLERK LORSON TO TRANSMIT TO THIS COURT THREE MOTIONS WHICH HAD BEEN FILED BY U.S. EXPRESS MAIL ON MARCH 31, 2000 IN *PRYOR V. SUMMIT MEDICAL ASSOCIATES*, NO. 99-1041; AND ON APRIL 23 AND JUNE 4, 2000 IN *STENBERG V. CARHART*, NO. 99-830; WHICH MOTIONS GAVE NOTICE TO THE COURT AS A PRIVATE ATTORNEY GENERAL AND INTERVENOR THAT AN ISSUE OF THE U.S. DISTRICT COURT'S LACK OF FEDERAL SUBJECT MATTER JURISDICTION UNDER THE 11TH AMENDMENT AND THE *YOUNGER* AND *WATSON V. BUCK* ABSTENTION DOCTRINES WAS BEFORE THE COURT IN *PRYOR V. SUMMIT MEDICAL ASSOCIATES*, SUPRA, AND *STENBERG V CARHART*, SUPRA, AND THE OTHER PARTIAL BIRTH ABORTION CASES, AND MUST BE ADDRESSED BEFORE THE COURT COULD PROCEED TO RENDER A "BINDING" JUDGMENT ON THE MERITS IN *STENBERG V. CARHART*, SUPRA, PURSUANT TO THE U.S. SUPREME COURT "JURISDICTIONAL" RULES ESTABLISHED IN *BENDER V. WILLIAMSPORT AREA SCHOOL DISTRICT*, 475 U.S. 534 AT 541 (1986) AND *STEEL CO. V. CITIZENS FOR A BETTER ENVIRONMENT*, 523 U.S. 83 (1998).

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JULY 20, 2000

APPENDIX B

COVER SHEETS OF 6 PLEADINGS OF THE ***AMICUS CURIAE*** IN ***STENBERG V. CARHART***, NO. 99-830, FILED WITH THE CLERK OF THE U.S. SUPREME COURT ON FEBRUARY 28, 2000; APRIL 14, 2000; APRIL 19, 2000; APRIL 23, 2000; JUNE 4, 2000; AND JUNE 25, 2000, WHICH DESCRIBE THE NATURE OF THE PROCEEDINGS IN THAT CASE.

(Reference: Brief ***Amicus Curiae*** of James J. Clancy at **page 3, paragraph 1.)**

B-1

No. 99-830

EXHIBIT 2

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1999

DON STENBERG, Attorney General of the State of Nebraska, et al.,

Petitioners,

v.

LEROY CARHART, M.D.,

Respondent.

On Writ of Certiorari to the
United State Court of Appeals for the Eighth Circuit

MOTION FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF UNDER RULE 37.3(b) WITH ATTACHED BRIEF AMICUS CURIAE OF JAMES J. CLANCY (MEMBER OF THE SUPREME COURT BAR) IN SUPPORT OF NEITHER PARTY, SUGGESTING REVERSAL OF THE JUDGMENT FOR RESPONDENTS FOR LACK OF ARTICLE 3, §2 FEDERAL SUBJECT MATTER JURISDICTION; PURSUANT TO THE AUTHORITY OF THE 11TH AMENDMENT, *WATSON V. BUCK*, 313 U.S. 387 (1941); *YOUNGER V. HARRIS*, 401 U.S. 37 (1971); *HUFFMAN V. PURSUE, LTD.*, 420 U.S. 592 (1975); AND THE *YOUNGER - HUFFMAN* ABSTENTION DOCTRINE.

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February 28, 2000

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*Counsel of Record.

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B-4

No. 99-830

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1999

DON STENBERG, Attorney General of the
State of Nebraska, et al.,

Petitioners,

v.

LEROY CARHART, M.D.,

Respondent.

On Writ of Certiorari to the
United State Court of Appeals for the Eighth Circuit

MOTION OF JAMES J. CLANCY, A MEMBER OF THE U.S. SUPREME COURT BAR: (1) FOR LEAVE OF COURT TO INTERVENE AS A DEFENDANT, PURSUANT TO F.R.C.P. 24, AND FILE A PETITION FOR WRIT OF MANDAMUS PURSUANT TO 28 U.S.C. §1651(a) AND AS A PRIVATE ATTORNEY GENERAL TO DEFEAT THE CLAIM OF "FEDERAL SUBJECT MATTER JURISDICTION" BY INVOKING THIS COURT'S DUTY TO CONSIDER SUBJECT MATTER JURISDICTION AS ITS FIRST ORDER OF BUSINESS; (2) TO SEEK A CLARIFICATION OF THIS COURT'S RULE WHICH AUTHORIZES AN INTERLOCUTORY "APPEAL" ON SUBJECT MATTER JURISDICTION, AS APPLIED IN *PRYOR V. SUMMIT MEDICAL ASSOCIATES* WHERE THIS COURT DID NOT ADDRESS THE 11TH AMENDMENT PLEA RAISED BY THE ALABAMA GOVERNOR; AND (3) FOR AN ATTORNEY'S FEE AS A PREVAILING DEFENDANT UNDER 42 U.S.C. §1988.

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April 23, 2000

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B-3

No. 99-830

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1999

DON STENBERG, Attorney General of the State of Nebraska, et al.

Petitioners,

v.

LEROY CARHART, M.D.,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

APPLICATION FOR EMERGENCY ORDER AUTHORIZING MOVING PARTY TO PARTICIPATE IN ORAL ARGUMENT ON APRIL 21, 2000 ON "LACK OF SUBJECT MATTER JURISDICTION" OF U.S. DISTRICT COURT, AS REQUESTED IN MOTION FILED IN THIS COURT ON APRIL 14, 2000.

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California Bar No. 26946

April 19, 2000

B-6

No. 99-M-_____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1999

IN RE JAMES J. CLANCY,

Petitioner.

MOTION FOR AN ORDER, DIRECTING CHIEF DEPUTY CLERK FRANCIS J. LORSON OF THE U.S. SUPREME COURT TO TRANSMIT SUBMITTED PLEADINGS TO THE COURT (FILED BY U.S. EXPRESS MAIL ON APRIL 23 AND JUNE 4, 2000) IN *DON STENBERG, ATTORNEY GENERAL OF THE STATE OF NEBRASKA, ET AL., V. LEROY CARHART, M.D.*, NO. 99-830 BEING: (A) 40 COPIES OF THE APRIL 23, 2000 "MOTION OF JAMES J. CLANCY, A MEMBER OF THE U.S. SUPREME COURT BAR: (1) FOR LEAVE OF COURT TO INTERVENE AS A DEFENDANT, PURSUANT TO F.R.C.P. 24, AND FILE A PETITION FOR WRIT OF MANDAMUS PURSUANT TO 28 U.S.C. §1651(a) AND AS A PRIVATE ATTORNEY GENERAL TO DEFEAT THE CLAIM OF 'FEDERAL SUBJECT MATTER JURISDICTION' BY INVOKING THIS COURT'S DUTY TO CONSIDER SUBJECT MATTER JURISDICTION AS ITS FIRST ORDER OF BUSINESS; (2) TO SEEK A CLARIFICATION OF THIS COURT'S RULE WHICH AUTHORIZES AN INTERLOCUTORY 'APPEAL' ON SUBJECT MATTER JURISDICTION, AS APPLIED IN *PRYOR V. SUMMIT MEDICAL ASSOCIATES* WHERE THIS COURT DID NOT ADDRESS THE 11TH AMENDMENT PLEA RAISED BY THE ALABAMA GOVERNOR; AND (3) FOR AN ATTORNEY'S FEE AS A PREVAILING DEFENDANT UNDER 42 U.S.C. §1988."; AND (B) 40 COPIES OF THE JUNE 4, 2000 "MOTION OF JAMES J. CLANCY, A MEMBER OF THE U.S. SUPREME COURT BAR: (1) FOR LEAVE OF COURT AND 'JUST CAUSE' TO AMEND HIS ORIGINAL PLEADING FILED APRIL 23, 2000, IN WHICH HE SEEKS TO INTERVENE AS A DEFENDANT PURSUANT TO F.R.C.P. 24, AND FILE A PETITION FOR WRIT OF MANDAMUS PURSUANT TO 28 U.S.C. §1651(a) AND AS A PRIVATE ATTORNEY GENERAL, TO DEFEAT CARHART'S 'RACE TO THE FEDERAL COURTHOUSE' WITH A MERITLESS CLAIM, BY INVOKING THIS COURT'S DUTY TO CONSIDER SUBJECT MATTER JURISDICTION AS ITS FIRST ORDER OF BUSINESS; (2) TO SEEK A CLARIFICATION OF THIS COURT'S RULE IN *PUERTO RICO SEWER AUTHORITY V. MEDCALF & EDDY* WHICH AUTHORIZES AN INTERLOCUTORY 'APPEAL' ON SUBJECT MATTER JURISDICTION, AS APPLIED IN *PRYOR V. SUMMIT MEDICAL ASSOCIATES* IN WHICH THIS COURT FAILED TO ADDRESS THE 11TH AMENDMENT PLEA RAISED BY THE ALABAMA GOVERNOR; AND (3) FOR AN ATTORNEY'S FEE AS A PREVAILING DEFENDANT UNDER 42 U.S.C. §1988."

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JUNE 25, 2000

B-5

No. 99-830

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1999

DON STENBERG, Attorney General of the
State of Nebraska, et al.,

Petitioners,

v.

LEROY CARHART, M.D.,

Respondent.

On Writ of Certiorari to the
United State Court of Appeals for the Eighth Circuit

MOTION OF JAMES J. CLANCY, A MEMBER OF THE U.S. SUPREME COURT BAR: (1) FOR LEAVE OF COURT AND "JUST CAUSE" TO AMEND HIS ORIGINAL PLEADING FILED APRIL 23, 2000, IN WHICH HE SEEKS TO INTERVENE AS A DEFENDANT PURSUANT TO F.R.C.P. 24, AND FILE A PETITION FOR WRIT OF MANDAMUS PURSUANT TO 28 U.S.C. §1651(a) AND AS A PRIVATE ATTORNEY GENERAL, TO DEFEAT CARHART'S "RACE TO THE FEDERAL COURTHOUSE" WITH A MERITLESS CLAIM, BY INVOKING THIS COURT'S DUTY TO CONSIDER SUBJECT MATTER JURISDICTION AS ITS FIRST ORDER OF BUSINESS; (2) TO SEEK A CLARIFICATION OF THIS COURT'S RULE IN *PUERTO RICO SEWER AUTHORITY V. MEDCALF & EDDY* WHICH AUTHORIZES AN INTERLOCUTORY "APPEAL" ON SUBJECT MATTER JURISDICTION, AS APPLIED IN *PRYOR V. SUMMIT MEDICAL ASSOCIATES* IN WHICH THIS COURT FAILED TO ADDRESS THE 11TH AMENDMENT PLEA RAISED BY THE ALABAMA GOVERNOR; AND (3) FOR AN ATTORNEY'S FEE AS A PREVAILING DEFENDANT UNDER 42 U.S.C. §1988.

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JUNE 4, 2000

B-2
No. 99-830

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1999

DON STENBERG, Attorney General of the
State of Nebraska, et al.,

Petitioners,

v.

LEROY CARHART, M.D.,

Respondent.

On Writ of Certiorari to the
United State Court of Appeals for the Eighth Circuit

MOTION: (1) FOR RECONSIDERATION OF MOTION TO FILE AN ATTACHED BRIEF AMICUS CURIAE; (2) TO INTERVENE AND FILE A PETITION FOR WRIT OF MANDAMUS PURSUANT TO 28 U.S.C. §1651(a) AND AS A PRIVATE ATTORNEY GENERAL TO DEFEAT THE CLAIM OF "FEDERAL SUBJECT MATTER JURISDICTION" BY INVOKING THIS COURT'S DUTY TO CONSIDER SUBJECT MATTER JURISDICTION AS ITS FIRST ORDER OF BUSINESS; (3) TO SEEK A CLARIFICATION OF THIS COURT'S RULE WHICH AUTHORIZES AN INTERLOCUTORY "APPEAL" ON SUBJECT MATTER JURISDICTION, AS APPLIED IN *PRYOR V. SUMMIT MEDICAL ASSOCIATES* WHERE THIS COURT DID NOT ADDRESS THE 11TH AMENDMENT PLEA RAISED BY THE ALABAMA GOVERNOR; AND (4) TO ADDRESS THIS COURT AT ORAL ARGUMENT ON "SUBJECT MATTER JURISDICTION"; AND FOR AN ATTORNEY'S FEE AS A PREVAILING DEFENDANT UNDER 42 U.S.C. §1988.

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April 14, 2000

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APPENDIX C

THE ARGUMENT MADE BY ***AMICUS*** TO THIS COURT IN THE CLAIM OF ***CLARENCE F. MURPHY V. PLANNED PARENTHOOD OF GREATER IOWA, INC., ET AL.,*** SCOTT COUNTY DISTRICT COURT CASE NO. 94716, AT PARAGRAPH 25 ON PAGES C-14 AND C-15 AND IN HIS ***AMICUS CURIAE*** BRIEF IN ***STENBERG V. CARHART,*** NO. 99-930, AT APPENDIX PAGES C-14 AND C-15, WHICH IS REPRODUCED HEREIN AS **APPENDIX C-1** THROUGH **C-22**, THAT SECRETARY OF STATE KATHERINE HARRIS ALSO ACTED IN A DUAL CAPACITY BOTH AS A QUASI-JUDICIAL FACT FINDER (SIMILAR TO THE FUNCTION OF THE CITY COUNCIL MEMBERS, AS LEGISLATORS, IN THE DETERMINATION OF A FACT QUESTION ON A ZONE CHANGE APPLICATION) AND NOT MERELY AS A STATE OFFICIAL EXERCISING HER DUTIES WITH RESPECT TO AN ADMINISTRATIVE MATTER.

(Reference: Brief *Amicus Curiae* of James J. Clancy at **page 2, paragraph 3, page 10, paragraph 1.)**

IN THE IOWA DISTRICT COURT
FOR SCOTT COUNTY

	)	**Case No. 94716**
Clarence F. Murphy,	)	
Plaintiff,	)	**First Amended Petition for a**
	)	**Declaratory Judgment and**
vs.	)	**an Injunction to Prevent**
	)	**Planned Parenthood's Use of**
Planned Parenthood of	)	**Land for the Obnoxious and**
Greater Iowa, Inc.	)	**Offensive Trade of Abortion**
Defendant,	)	**and Infanticide in Violation**
	)	**Of: (1) Petitioner Murphy's**
and	)	**Successful Statutory Protest**
	)	**Pursuant to Bettendorf**
The City of Bettendorf,	)	**Zoning Code §24.2 and**
Iowa	)	**§24.4; and (2) Paragraph 3**
Defendant,	)	**of the Reciprocal Restrictive**
	)	**and Protective Covenants**
and	)	**That Run with Both**
	)	**Petitioner Murphy's Lot 3 of**
Middle Road Investors, Inc.	)	**Block 4 and the Adjoining**
Defendant.	)	**Land of Planned Parenthood**
	)	**to the South, Which Lies**
		Between Block 4 and Block 1
		and Within the Quad City
		Technological Center, a
		Planned Unit Development
		(P.U.D. Zone).

COMES NOW Plaintiff, Clarence F. Murphy, and for his Petition for a Declaratory Judgment and Injunction, states as follows:

PARTIES

1. Petitioner Clarence F. Murphy and his wife Hwa Cha Murphy (hereinafter called "Petitioner Murphy" and "Murphy") are citizens of Bettendorf, Iowa, who reside at 2835 Willow Drive, Bettendorf, Iowa. Murphy and his wife are the owners of two twelve plex apartments known as 2655 Tech Drive, Bettendorf (a.k.a. Lot 3, of Block 4) and 2750 Tech Drive, Bettendorf (a.k.a Lot 2 of Block 2) of the Quad City Technological Center, a planned unit development and hold title to such properties in the name of Murpak Enterprises, Inc., a Delaware Corporation which is wholly owned by Murphy and his wife Hwa Cha.. See **Exhibit** pages **C-3** and **C-4**, infra.

2. Lot 3 of Block 4 was conveyed by Middle Road Investors, Inc. (hereinafter called "Defendant Middle Road" and "Middle Road") to Petitioner Murphy by Warranty Deed dated January 30, 1976, which was filed with the Office of Scott County Recorder on February 18, 1976 as Document 2524-76 (after the Iowa Supreme Court decision in ***Kuntz*** [infra, 1975] and ***Harris***, [infra, 1975]). Defendant Middle Road had acquired its ownership by Warranty Deed from the City of Bettendorf (hereinafter called "Defendant Bettendorf" and "Bettendorf") on the same date (February 18, 1976) in partial performance of a contract dated November 7, 1972 and recorded in the Office of Scott County Recorder as Document 1947-73. The abstract for the Plat of Lot 3 of Block 4, which is attached as **Exhibit A** and incorporated by reference herein, contains the following certification at page **A-3**, last paragraph:

> " NOW THEREFORE, Middle Road Investors, Inc., and the City of Bettendorf, Iowa, hereby declare that the real property described in the Surveyor's Certificate is and shall be held, transferred, sold, conveyed and occupied subject to the Restrictive and Protective Covenants heretofore filed on April 11, 1973, as Document #5134-73 with the platting of Block 1 of

> Quad City Technological Center shall remain in effect and apply to Lot 3 of Block 4 as platted herein.
>
> " Dated this 20th day of January, 1976.
>
> MIDDLE ROAD INVESTORS, INC.
> By Robert D. Danico, President
> By C.J. Munson, Secretary
>
> CITY OF BETTENDORF, IOWA
> By William C. Glynn, Mayor
> By Margaret W. Lake, Deputy City Clerk"

3. Lot 2 of Block 2 was conveyed to Petitioner Murphy and his wife by Ed Speer Construction, Inc. by Warranty Deed dated February 25, 1994 and filed on March 4, 1994 in the Office of Scott County Recorder as Document No. 7001-94 in full performance on that real estate contract dated June 1, 1979 and recorded on January 23, 1980 in the Office of the Scott County Recorder as Document No. 1155-80. The abstract for the Plot of Lot 2 of Block 2 which is attached as **Exhibit B** and incorporated by reference herein shows that the Defendant Bettendorf was an owner with Middle Road of Block 2 and contains the following certification at page **B-3**, last paragraph:

> " NOW THEREFORE, Middle Road Investors, Inc., and the City of Bettendorf, Iowa, hereby declare that the real property described in the Surveyor's Certificate is and shall be held, transferred, sold, conveyed and occupied subject to the Restrictive and Protective Covenants heretofore filed on April 11, 1973, as Document #5134-73 with the platting of Block 1 of Quad City Technological Center shall remain in effect and apply to Lot 2 as platted herein. In addition thereto, each lot owner of Lots in said Block 2 shall share the common driveways into said Block 2 from Tech Drive and P.U.D. Drive.

" Dated this 1st day of July, 1975.

MIDDLE ROAD INVESTORS, INC.
By Robert D. Danico, President
(Corporate Seal) By C.J. Munson, Secretary

CITY OF BETTENDORF, IOWA
By William C. Glynn, Mayor
(Seal of City of Bettendorf, Iowa)
By James W. Strieck, Clerk"

4. Defendant Planned Parenthood of Greater Iowa, Inc. (hereinafter called "Defendant Planned Parenthood" and "Planned Parenthood") is the present owner of a parcel of land within the metes and bounds of the Planned Unit Development (hereinafter "P.U.D. Zone") known as Quad City Technological Center to the City of Bettendorf, lying between Block 1 and Block 4, the Lot having been purchased by Defendant Planned Parenthood on April 14, 1997. The northern boundary of the Planned Parenthood property abuts and forms the southern boundary of Lot 1, Lot 2 and Lot 3 of Block 4. The southern boundary of the Planned Parenthood property abuts and forms the northern boundary of Block 1, and the northern boundary of the right of way know as Happy Joe Drive, as shown on the two maps which are attached to this Petition as **Exhibit C** and pleaded by incorporation herein. At the time of the platting of Lot 3 of Block 4, it was the expressed intention of Defendant Bettendorf and Defendant Middle Road, as the developers of the Quad City Technological Center to the City of Bettendorf, to place the same "restrictive" and "protective" covenants that were attached to Block 1 on the future development and platting of the P.U.D. Zoned Planned Parenthood property, which was owned in fee simple by Defendant Bettendorf and Defendant Middle Road, so that the "benefits" and "restrictions" on all of the said Lots in said land development were "reciprocal", as expressed and accomplished in the recording of the platting of Blocks 1 through 6 as a whole, see **Exhibit D** to this Petition (infra, at page **D-3**, the first paragraph and page **D-6**, paragraph

11) and pleaded by incorporation herein. Petitioner avers that the terms of the restrictive and protective covenants were extended by the developer, Defendant Middle Road, for a finite period of 10 years to the year 2003 to provide time to complete the platting of the plan as a whole, so that upon the completion of that land development, each of the lots within the P.U.D. Zone would have and enjoy the same benefits and burdens.

5. By the platting of Lot 3 of Block 4, Petitioner Murphy's property was burdened by the restrictive covenants but did not, at that time, receive the promised reciprocal benefits (the "protective" covenants) from the adjoining Planned Parenthood property the title to which, was thereafter "clouded" by the "equitable protective servitude" which attached to Murphy's land to the north. The "restrictive" and "protective" covenants in the platting of Lot 3, Block 4 are writings which establish a bilateral contract between Defendant Bettendorf and Defendant Middle Road as the developers and Murphy who, by virtue of his purchase of Lot 3, Block 4, joined in the unilateral agreement of Defendant Bettendorf and Defendant Middle Road, who owned the said "P.U.D. Zoned" Planned Parenthood land in fee simple in 1975.

6. The City of Bettendorf is named as a Defendant because of its participation with Middle Road in the draftsmanship and approval of Paragraphs 3 and 11 of the Restrictive (burden) and Protective (benefit) Covenants as noted above and in that part of the Abstract for the Final Plat of Block 1 (see **Exhibit A-2** and **A-3** and **Exhibit D** to this Petition at pages **D-1** through **D-11**) which reads in part as follows with respect to Paragraphs 3 and 11:

"RESTRICTIVE AND PROTECTIVE COVENANTS

" MIDDLE ROAD INVESTORS, INC., an Iowa Corporation, hereby establish and declare the following restrictive and protective covenants to be applicable to the following described real estate located in Scott

County, Iowa, to-wit: All lots in Blocks 1 through 6 of The Planned Unit Development known as Quad City Technological Research Center, to the City of Bettendorf, Iowa, which plat is recorded as Document No. 5134-73 in the office of the Recorder of Scott County, Iowa:

" 1. No building . . . .

" . . . .

" 3. No obnoxious or offensive trade shall be carried on upon any lot nor shall anything be done thereon which may be or become an annoyance or nuisance to the other lot owners in said addition.

" . . . .

" 11. These restrictions shall be in force from the date of the Owner's Certificate to which it is an exhibit until January 1, 1993 or until such later date to which the same may be extended as hereinafter provided, and shall run with and be binding upon all lots in said addition, and every part thereof and shall be appurtenant to and for the benefit of all said lot owners. These restrictions shall be automatically extended for an additional ten-year period on January 1, 1993, and each ten year anniversary of said date unless a written instrument signed and acknowledged by the owners of a majority of all the lots in Quad City Technological Center shall prior to such date or anniversary be recorded with the Recorder of Scott County, Iowa, abrogating or modifying the same in whole or in part to the extent therein set forth. In determining the majority of said lot owners, each lot shall be entitled to one vote to be cast according to the will of a majority in interest of any co-owners having interest therein whether such majority is represented by a majority of the undivided

interests in an entire lot or ownership of the greater portion of a subdivided lot. A contract purchaser or life tenant of the legal title shall be deemed the owner. In all other respects, ownership shall refer to record owner ship of legal title." (Our emphasis.)

" 11. Invalidity, abandonment or waiver of any one or more of the same restrictions shall in no wise affect any of the other restrictions, which shall remain in full force and effect.

" 12. In the event any person who may at any time own or occupy any of the numbered lots, or part thereof, in said Addition should violate or threaten to violate any of these restrictions, said Middle Road Investors, Inc. its successors and assigns, and the owners from time to time of any of the numbered lots in said Quad City Technological Center shall have the right to proceed in any court of law or equity, by injunction or otherwise, to enforce performance and restrain violation, or pursue any other remedy to which it or they may be entitled and shall have the right to collect from the party or parties violating or threatening to violate the same, either jointly or severally, all damages, costs, expenses and counsel fees resulting from the violation thereof, or incurred in, or in connection with, said proceedings.

"Dated at Bettendorf, Iowa, this 3rd day of April, 1973.

Middle Road Investors, Inc.
By: Robert D. Danico, President
(Corporate Seal) By: C.J. Munson, Secretary"

7. Thereafter, Middle Road did not plat Block 5 and 6 as planned. Instead, on June 16, 1976 (5 month after the conveyance of Lot 3, Block 4 to Murphy), Defendant Middle Road, without Notice to Murphy, conveyed the Planned Parenthood property by a Warranty Deed to "Robert Versman

and Rose Versman, husband and wife, as tenants in common, and to their heirs and assigns." The legal document conveying the real estate, contains an asterisk and the typed instruction reading "subject to restrictive covenants recorded as document 5134-73 S.C. Iowa Rec. Off." which is initialed by Robert D. Danico as President and C.J. Munson, as Secretary of Middle Road, Inc. (see Document 10830-76 at **Exhibit E** to this Petition).

8. 10 years later, on December 23, 1986, Robert H Versman and Rose Versman conveyed an undivided 1/12 interest in the Planned Parenthood property to each of the following six persons (a total of 50%):

Kenneth J. Versman
Linda Jean Versman
Stuart J. Heller
Judith Lee Heller
Frederick J. Glassman
Frances Belle Glassman

(See Document 25349-86, recorded on December 31, 1986, at **Exhibit F** to this Petition which contains the typed instruction reading: "Subject to: 1. Easements, covenants and restrictions of record.")

9. On December 24, 1986, Robert H. Versman and Rose Versman conveyed an undivided 1/12 interest in the Planned Parenthood property to each of the following six persons (a total of 50%):

Kenneth J. Versman
Linda Jean Versman
Stuart J. Heller
Judith Lee Heller
Frederick J. Glassman
Frances Belle Glassman

(See Document 1735-87, recorded on January 28, 1987 at **Exhibit G** to this Petition which contains the typed instruction reading: "Subject To: Easements, covenants and restrictions of record" and "This Warranty Deed confirms the deed executed by the Grantors on December 23, 1986, . . . recorded in the Scott County Recorder's office as Document No. 25349-86 and ratifies and approves the conveyance of a total of one-half of the real property legally described in Exhibit A hereto").

10. On January 3, 1987, Robert H. Versman and Rose Versman conveyed an undivided 1/12 interest in the Planned Parenthood property to each of the following six persons (a total of 50%):

Kenneth J. Versman
Linda Jean Versman
Stuart J. Heller
Judith Lee Heller
Frederick J. Glassman
Frances Belle Glassman

(See Document 1736-87 recorded on January 28, 1987 at **Exhibit H** to this Petition which contains the typed instruction reading: "Subject to: Easements, covenants and restrictions of record" and "This Warranty Deed confirms the deed executed by the Grantors on Jan. 2, 1987 recorded in the Scott County Recorders office as Document 165-87 and ratifies and approves the conveyance of a total of one-half of the real property legally described in Exhibit A hereto.")

11. On April 14, 1997, Kenneth J. Versman and Linda Jean Versman, Husband and Wife, Stuart J. Heller and Judith Lee Heller, Husband and Wife, and Frederick J. Glassman and Frances Belle Glassman, Husband and Wife, conveyed by Warranty Deed the Planned Parenthood property to Planned Parenthood of Greater Iowa, Inc. or Planned Parenthood of Greater Iowa Foundation, Inc. (See Document 09482-97, dated April 14, 1997 and recorded April 24, 1997 at **Exhibit I** to this

Petition (last in order).

PETITIONER MURPHY'S CONTENTIONS

12. An actual controversy has arisen between Petitioner Murphy and Defendants, relating to the legal rights and duties of Defendant Planned Parenthood and Defendant Bettendorf, in respect to said Lots as those rights and duties are affected by Paragraph 3 and Paragraph 11 of the above stated Restrictive (burden) and Protective (benefit) Covenants. Petitioner Murphy contends that Paragraph 11 must be construed against its co-author Defendant Bettendorf and read to extend the Restrictive and Protective Covenants automatically for an additional, finite ten-year period on January 1, 1993 to January 1, 2003 without reference to that language which appears after the "comma" which follows the date "January 1, 1993". It would appear that such "finite" language was adopted to keep the first additional 10-year period extension in compliance with the requirements of **Bettendorf Code §614.24** which was enacted in 1966 and was interpreted by the Iowa Supreme Court in ***Compiano v. Kuntz***, 226 N.W.2d 245 (Iowa 1975) and ***Presbytery of Southeast Iowa v. Harris***, 226 N.W.2d 232, 237-38, 242 (Iowa 1975). Because the "finite" 10-year extension period was accomplished during the first 21-year period and was a recorded document, it met the requirements of **Bettendorf Code §614.24**, which then read "unless the claimant shall, by himself, or by his attorney or agent . . . . Shall file a verified claim with the recorder of the county wherein such real estate is located within said twenty-one year period".

13. Defendant Bettendorf is a **Home Rule** City in the State of Iowa which is empowered to enact zoning ordinances (i.e., P.U.D. and C-5 Zones) and amendments (zone changes) on real property in the City of Bettendorf, acting by and through the Bettendorf City Council, and to act as "parens patria" on behalf of Petitioner Murphy and other Bettendorf residents

(citizens) in defense of their property rights under such zoning ordinances when such zoning rights of the City of Bettendorf are challenged by third parties in a Federal District Court in a Federal Civil Rights action pursuant to **42 U.S.C. §1983**.

14. Such zoning ordinances and zone changes are accomplished by a legislative act by the City Council to accomplish the same. Under the **Doctrine of Separation of Powers**, the general rule is that the Courts cannot write or rewrite the zoning laws, nor force the legislative body to enact or amend a zoning ordinance. An amendment which is adopted in disregard of the protest of property owners who are acting pursuant to a valid "protest" ordinance, is void. The City of Bettendorf is a necessary party in that a Federal Judgment of U.S. District Court Judge Charles R. Wolle in a Federal Civil Rights action brought by Defendant Planned Parenthood, purports to rezone the Planned Parenthood property (P.U.D. Zone to C-5 Zone). Under the **Doctrine of Separation of Powers**, the general rule is that a federal court has no power (lack of subject matter jurisdiction) to rezone real property in the City of Bettendorf, which function (zoning), under the U.S. Supreme Court decision in ***Huffman v. Pursue, Ltd.***, infra., must be held to be both a "municipal affair" and an "important state matter" which is protected by the **11th Amendment**.

15. Defendant Planned Parenthood wishes to construct a clinic in Bettendorf, Iowa which will cater to the "abortion" trade. The **Bettendorf Zoning Ordinance** allows abortion clinics on property in a C-5 zone. Had Planned Parenthood purchased a C-5 Zoned property, it would not have had a zoning problem. Instead, it chose to purchase a property in a P.U.D. Zone (which was surrounded by and within 200 feet of three relatively new residential apartment complexes on Lots 1, 2, and 3 of Block 4 which were benefitted by a **Bettendorf "Protest" Ordinance**) and submitted an application for a Zone Change by ordinance to C-5.

16. The adjacent apartment owners (see **Exhibit C–**

Murphy and Jecklin) and Larry Whitty, the owner of Lot 1, Block 1 objected and made a successful statutory protest (**20% Rule**) against the zone change (being within 200 feet of the Planned Parenthood property), pursuant to **Bettendorf Zoning Code §24.2** and **§24.4**, which precluded the Bettendorf City Council from adopting a C-5 Zoning Ordinance unless the City Council voted 6-1 for the zone change. The City Council on March 16, 1996, voted 5-1 not to adopt the C-5 Zoning ordinance.

17. Zoning Rights are "**Vested Rights**" under Iowa Law and the **Iowa Constitution**. The 8th Circuit Court of Appeals has so held in its decision in ***Nemmers v. City of Dubuque, Iowa***, 716 F.2d 1194 (1983). Under Iowa case law, a City Council's action on a zone change request is broadly defined to be a "judicial function" which can be appealed by Writ of certiorari to the Iowa District Courts, see ***Montgomery v. Bremer County Board of Supervisors***, 299 N.W.2d 687 at 692 (Iowa Supreme Court 1980). If such an appeal is not filed within 30 days, the City Council's actions become final under Iowa law, in which case, under the **11th Amendment** and ***Huffman v. Pursue, Ltd.***, 420 U.S. 592 at 606, fn. 18 and 19 and the progeny of ***Huffman*** (***University of Tennessee v. Elliott***, 470 U.S. 788, 92 L.Ed.2d 635, 106 S.Ct. 3220 [1986], and ***Migra v. Warren City School Dist. Bd. of Ed.***, 465 U.S. 75, 70 L.Ed.2d 56, 104 S.Ct. 892 [1984], and ***Plough v. West Des Moines Community School District***, 70 F.3d 512 at 516-517 [CA 8th 1995]), the City Council's quasi-judicial order also becomes final and ***Res Judicata*** under Federal law, because the federal courts are required to give this ***Res Judicata*** **Rule** the same interpretation given it by the state court.

18. On March 21, 1997, one year and two days after the City Council's denial of the zoning change, Defendant Planned Parenthood filed a Civil Rights Action under **42 U.S.C. §1983** in the U.S. District Court (pleading what is, in essence, an appeal from the Bettendorf City Council's quasi-judicial Order denying the C-5 zoning Application). Planned

Parenthood did not name as defendants the adjacent apartment owners and Larry Whitty, who made the successful statutory protest.

19. The City of Bettendorf filed a Motion for a Partial Summary Judgment, pursuant to the **11th Amendment** and the ***Res Judicata*** **Doctrine**. U.S. District Judge Charles R. Wolle (egregiously) denied the city's ***Res Judicata*** Plea. Upon the conclusion of the Federal trial, Judge Wolle entered a judgment which purported to rezone the property to C-5 Zoning.

20. Petitioner Murphy timely moved to intervene (immediately after the City of Bettendorf announced its decision not to act as "***parens patria***" and pursue an appeal from the Judgment of U.S. District Court Judge Wolle), and within the appeal time period, for the purpose of appealing U.S. District Court Judge Wolle's Judgment on **11th Amendment** (lack of subject matter) jurisdictional and other grounds, including his denial of Bettendorf's Summary Judgement Motion on a plea of ***Res Judicata***.

21. U.S. District Court Judge Wolle ruled (cursorily and egregiously) on Petitioner Murphy's extensive pleadings: (1) that the Intervention Motion was "untimely", (2) refused to address the merits of Petitioner's right to mandatory intervention, and the **11th Amendment** Jurisdictional and ***Res Judicata*** issues raised by Murphy at the time of Murphy's Intervention Motion, and (3) further refused to set such matters for oral argument.

22. In the Court of Appeals below, Petitioner Murphy sought judicial relief from Judge Wolle's arrogation of Federal Judicial Power in two separate forms: by the filing of a direct appeal and by the filing of a verified complaint in an original Petition for Writ of Mandamus in the 8th Circuit Court of Appeals, pursuant to **28 U.S.C. §1651(a)**.

23. In a highly unorthodox ruling, the Court of Appeals treated the Appellant's Opening Brief on the direct appeal and the original petition for a prerogative writ of mandamus as though they had been consolidated, and in a brief single order, denied the Petition for Writ of Mandamus without an opinion and summarily affirmed Judge Wolle's Judgment, also without opinion. The Court of Appeals thereafter also denied a Petition for Rehearing and Suggestion for Rehearing En Banc in each of the two cases. The U.S. Supreme Court refused to issue its discretionary Writ of Certiorari to review such erroneous rulings.

24. Petitioner Murphy contends that the **11th Amendment** and the **Doctrines** of ***Res Judicata*** and ***Stare Decisis*** control this litigation and that both of the Federal Courts were in error in their refusal to address the issue of "lack of subject matter jurisdiction" of the Federal Courts under the **11th Amendment** claim. See ***Steel Co. v. Citizens for a Better Environment***, 523 U.S. 83, 140 L.Ed.2d 210, 118 S.Ct. 1003 (March 4, 1998), at **Point III** (duty to address the questions of subject matter jurisdiction as the first order of business, and on its own motion, if the parties to the lawsuit do not bring the matter to the trial court's attention); ***Puerto Rico Aqueduct and Sewer Authority v. Metcalf and Eddy, Inc.***, 121 L.Ed.2d 605 at 610, 506 U.S 139, 113 S.Ct. 684 (1993) (creating a new **Rule of Court** re the issue "lack of subject matter jurisdiction"), ***Wisconsin Dept. of Correction v. Schacht***, 524 U.S. ___, 141 L.Ed.2d 364 at 375-378, 118 S.Ct. ___, No. 97-461 (June 22, 1998) (Associate Justice Kennedy's concurring opinion re the issue of "lack of subject matter jurisdiction"). See ***Kerr v. U.S. District Court***, 426 U.S. 394, 48 L.Ed.2d 725, 96 S.Ct. 2119 (1976); ***Will v. U.S.***, 389 U.S 90, 19 L.Ed.2d 305, 88 S.Ct. 269 (1967); and **Supreme Court Practice**, 7th Ed., Stern, Gressman Shapiro, Geller, at page 495.

25. Plaintiff Murphy further contends: (1) that he is entitled to a Declaratory Judgment in the District Court of Iowa which holds that, under Iowa Law, the Bettendorf City

Council's action on the above zone change is a "judicial" function which became final when Defendant Planned Parenthood did not perfect an appeal to the Iowa District Court by Writ of Certiorari within 30 days of the date on which the City Council acted; (2) that the record shows that the adjacent apartment owners made a successful statutory protest which precluded the Bettendorf City Council from adopting a C-5 Zoning Ordinance unless the City Council voted 6-1 for the Zone Change, and that the City Council on March 19, 1996 voted 5-1 not to adopt the C-5 Zoning Ordinance; (3) that pursuant to such successful protest, the adjacent apartment owners acquired "**vested rights**" in the City Council's Final Order (judgment); and (4) that the City Council's final order which denied the C-5 Zoning Application was and is a final judgment which, under Iowa law and the **Constitutional Doctrine of *Res Judicata*** was and is entitled to recognition by the U.S. District Court, the 8TH Circuit Court of Appeals and the U.S. Supreme Court.

26. Murphy believes and avers that the Bettendorf City Attorney, Greg Jaeger, will acknowledge on behalf of the Defendant Bettendorf: (1) that the adjacent property owners did make a successful protest under the **Bettendorf "Protest" Ordinance**, which reads as follows:

> "24.4 In case the commission does not approve the proposal or in case of a protest against such change signed by twenty (20) percent or more of one or more of the following groups:
>
> " (a) Property owners of the lots included in such proposed change.
>
> " (b) Property owners immediately adjacent in the rear thereof extending the depth of one lot or not to exceed two hundred (200) feet therefrom (excluding street right-of-way).

" (c) Property owners immediately adjacent in the front thereof extending the depth of one lot or not to exceed two (200) feet therefrom (excluding street right-of-way).

" (d) Property owners immediately adjacent to any and all sides (including the front and rear sides) of the proposed change extending one lot or not to exceed two hundred (200) feet therefrom (excluding street right-of-way).

" Such amendment shall not become effective except by the favorable vote of at least three-fourths (3/4) of all the members of council.";

(2) that the **"Protest" Ordinance** is constitutionally valid and was validly applied; and (3) that the **Doctrine of *Res Judicata*** as pleaded by Defendant Bettendorf in the Federal Civil Rights lawsuit did, in fact, require that the Civil Rights action which was filed in the U.S. District Court be dismissed for lack of subject matter jurisdiction under the **11th Amendment** and ***Huffman***, supra.

27. Murphy further avers that, upon the successful termination of the Declaratory Judgment proceedings before this Court, Plaintiff intends to file a Declaratory Judgment Action in the U.S. District Court to have Judge Wolle's Judgment vacated on the ground that the Federal District Court lacked **Article 3, §2** subject matter jurisdiction under the **11th Amendment**, and the U.S. Supreme Court's ***Huffman*** **Abstention Doctrine**, ***Rooker-Feldman*** **Abstention Doctrine**, ***Res Judicata*** **Doctrine**, and the ***Stare Decisis*** **Doctrine**, and for other reasons which have been made of record in the U.S. District Court, the U.S. Court of Appeals for the 8th Circuit, and the U.S. Supreme Court; and if necessary, will petition the U.S. Supreme Court for a Writ of Certiorari on the **11th Amendment** issue and

Substantial Federal Questions which have been presented to the U.S. Supreme Court by the conflict in the determination of this issue by the State of Iowa and Federal Judiciary. See, in this regard, the copy of the pleadings on file in the U.S. Court of Appeals for the 8th Circuit and in the U.S. Supreme Court which are being lodged concurrently with the Clerk of this Court by Petitioner Murphy.

28. No other adequate remedy other than that herein prayed for exists by which the rights of the parties hereto may be determined; in that (1) U.S. District Court Judge Wolle has egregiously (willfully, knowingly and wrongfully) denied Petitioner Murphy's lawful right to intervene in the Federal Civil Rights action of Defendant Planned Parenthood, as an indispensable party; in order that he might appeal the (egregiously) erroneous judgment of Judge Wolle which created the opportunity for Planned Parenthood to engage in a course of conduct which constitutes a breach of **Bettendorf Zoning Code §24.2** and **§24.4** and Paragraph 3 of the Restrictive and Protective Covenants; (2) the Court of Appeals for the 8th Circuit refused to entertain Petitioner Murphy's appeal from Judge Wolle's erroneous judgment and a Petition for Writ of Mandate; and (3) the U.S. Supreme Court refused to exercise its discretionary review of the Federal Court record by Writ of Certiorari. Because Murphy was wrongfully denied the right to intervene in the Federal Civil Rights lawsuit, he is not bound by Judge Wolle's Judgment in the Civil Rights action under the **Doctrine of *Res Judicata***; see ***International Union v. Scofield*** 382 U.S. 205, 15 L.Ed.2d 272 (1965).

29. Murphy avers and contends that the Restrictive and Protective Covenants which were established by the Defendant Middle Road Investors, Inc. on April 3, 1973 at the time of the platting of Block 1 (see Petition at **Exhibit D-1** through **D-11**) and re-established and confirmed by the Defendant Middle Road Investors, Inc. on January 20, 1976 as the owner and proprietor of Lot 3 of Block 4, as set forth at **Exhibit A-2** and **A-3** to this Petition, run with the land and were

fully operational and binding on all parties during the period January 20, 1976 through January 1, 1993; and on that date were automatically extended for an additional ten year period from January 1, 1993 through January 1, 2003 by the provision of paragraph 11 of the Restrictive and Protective Covenants (see **Exhibit D-6** and **D-7**) and were and are presently operative and binding on all parties, including the Defendant Planned Parenthood of Greater Iowa, Inc. from and after April 14, 1997, when Planned Parenthood received title to such property by Warranty Deed from Kenneth J. Versman, etc. (see Petition at paragraph 11 on page 6 of the Petition and Document 09482-97, dated April 14, 1997 and recorded April 24, 1997 at **Exhibit I** to this Petition [last in order]).

30. Defendant Planned Parenthood's projected use of such property in the face of the successful protest of the Bettendorf residents adjoining such property under **Bettendorf "Protest" Zoning Code §24.2** and **§24.4** constitutes an immediate and continuing breach of Paragraph 3 of the Restrictive and Protective Covenants which requires that "No obnoxious or offensive trade shall be carried on upon any lot nor shall anything be done thereon which may be, or become, an annoyance or nuisance to the other lot owners in said addition." (Our emphasis.)

31. Petitioner has no adequate remedy at law to compensate for the harm to the reputation and contemporary community standards of the City of Bettendorf, Iowa which flows from the knowledge of the general public that land in Bettendorf, Iowa, a Home Rule City, which is adjacent and within 200 feet of an existing residential neighborhood is being used for the conduct of early abortions, late term abortions, and partial birth abortions also known and referred to as "infanticide". Under these facts and circumstances, and upon this record, Defendant Planned Parenthood must be held to be engaged in a trade which is "obnoxious" and "offensive" as a matter of law under the terms of paragraph 3 of the Restrictive and Protective Covenants (see **Exhibit D-5** to this Petition); and

is both a public and private nuisance under the **English Common Law**, the early **American Common Law**, the **Statutes of the State of Iowa** and the **"Protest" Zoning Code, §24.2** and **§24.4** of the City of Bettendorf. The Defendant's continuous breach of said Covenant and maintenance of a public and private nuisance will result in irreparable harm to the value of Petitioner's land and the pecuniary amount of such damage, which is impossible to ascertain, warrants the issuance of a preliminary injunction.

QUESTIONS PRESENTED FOR THE IOWA DISTRICT COURT ON THIS PETITION FOR A DECLARATORY JUDGMENT.

1. Whether **Bettendorf Zoning Code §24.2** and **§24.4** are constitutional on their face?

2. Whether the order of the Bettendorf City Council which denied the Planned Parenthood Zone Change Application from P.U.D. to C-5 zoning by a 5-1 vote is ***Res Judicata*** under Iowa law because Planned Parenthood did not timely appeal such order to the Iowa District Court by Writ of Certiorari?

3. Whether that part of the record which shows that three of the adjacent property owners (Clarence Murphy [Petitioner], owner of Lot 3, Block 4, Lois Jecklin, owner of Lots 1 and 2 of Block 4, and Larry Whitty, owner of Lot 1, Block 1) made a successful statutory protest under **Bettendorf Zoning Code §24.2** and **§24.4**, mandates a ruling by this Court that the zoning on the Planned Parenthood property under Iowa law is "P.U.D." and remains as "P.U.D."?

CONCLUSION

The complex propositions of Iowa Zoning law which are framed by this Petition provide irrefutable, positive proof:

(1) that legal issues involving the zoning laws of a state are "important state matters" which are protected by the **11th Amendment** and the ***Huffman*** **Abstention Doctrine**, and (2) that a U.S. District Judge lacks "subject matter jurisdiction" of such issues which, according to the laws of probability, will be decided differently for each state based upon the Judicial Policy of the state which is affected. The U.S. Supreme Court has held in the ***Huffman*** cases that, pursuant to the ***Res Judicata*** **Doctrine**, the U.S. District Court must extend to such State Court judgments the interpretation given by the State Court Judiciary (the equivalent of the "**Full Faith and Credit**" provision of the **Federal Constitution** which governs the responsibility of the Judiciary of State Courts to acknowledge the judgments of the Judiciary of other State Courts).

WHEREFORE, Petitioner prays that judgment be entered against the Defendants:

1. For a Declaration, pursuant to Iowa Law, that the Bettendorf City Council's action on Planned Parenthood's Zone Change Application from PUD to C-5 Zoning is a judicial function which became final when Defendant Planned Parenthood did not perfect an appeal to the Iowa District Court by Writ of Certiorari within 30 days of the date on which the City Council acted on such Application; that the record shows that the **"Protest" Ordinance** is constitutional and was applied in a constitutional manner; that pursuant to said successful protest, the adjacent property owners acquired "**vested rights**" in the City Council's Final Order (judgment); that the City Council's denial of the C-5 Zoning Application, under the constitutional **Doctrine of *Res Judicata*** is a Final Judgment and that the Zoning on the Planned Parenthood property under Iowa law is "P.U.D." as enacted by the Bettendorf City Council.

2. That during the pendency of this action, a preliminary injunction issue to enjoin and restrain the Defendant Planned Parenthood from the acts and conduct aforesaid.

3. That the Defendant Planned Parenthood be restrained and enjoined from violating and continuing to violate and breach **Bettendorf "Protest" Ordinance §24.2 and §24.4** and Paragraph 3 of the Protective Covenants that runs with Lot 3 of Block 4 during the time the same is to remain in force and effect;

4. For costs, and attorneys fees and other relief as provided above; and

5. For such other and further relief as the Court may deem proper.

DATED: January ___, 2000

Respectfully submitted,

_____

Clarence J. Murphy, Plaintiff

VERIFICATION

State of California) Declaration under Penalty of
} SS: Perjury, Pursuant To California
Los Angeles County) Code of Civil Procedure §2015.5

I am the attorney for Plaintiff Clarence J. Murphy and as such attorney, the facts as pleaded in the above Petition are more fully known to me. I therefore make this Declaration and declare under penalty of perjury under the laws of California that the forgoing **First Amended Petition for a Declaratory Judgment and an Injunction** is true and correct.

Dated: January 31, 2000
Location: 9055 La Tuna Canyon Road
La Tuna Canyon, California 91352-2221

/S/

James J. Clancy, California Bar No. 26946
9055 La Tuna Canyon Road
La Tuna Canyon, California 91352-2221
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Attorney for Petitioner Clarence J. Murphy